IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 6937 of 1999
In
SPECIAL CIVIL APPLICATION No. 19260 of 2006
with
SPECIAL CIVIL APPLICATION No. 19267 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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TINABHAI LAKHMANBHAI HARIJAN & 17 - Petitioner(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR BHUSHAN B OZA for Petitioner(s) : 1 - 18.MR ANMOL SHARON for Petitioner(s) : 1,
GOVERNMENT PLEADER for Respondent(s) : 1,
MR BM MANGUKIYA for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 11/09/2006

COMMON ORAL JUDGMENT

1. The petitioners of Special Civil Application No.6937 of 1999 have approached this Hon'ble Court for the appropriate writ to quash and set aside the Notice(Annexure-A) dated 06.09.1999, issued by Sola Gram Panchayat for removal of the encroachment made by the petitioners by constructing huts.

2. The petitioners of Special Civil Application No. 19260 of 2006 and others have preferred the petitions for challenging the notice dated 14.08.2006, issued by respondent No.2 for removal of the encroachment made over the land, which is reserved for garden.

3. The learned counsel appearing for the petitioners Ms. Shah on 08.09.2006 had submitted that similar matter is also pending before this Court being Special Civil Application 6937 of 1999 and therefore, this Court on 08.09.2006 had passed the order directing Special Civil Application No. 6937 of 1999 also to be listed on 11.09.2006, i.e. today and accordingly, all the matters are listed today.

4. The contention raised on behalf of the petitioners in Special Civil Application No. 6937 of 1999 is that the land is under the control of the Panchyat and the principle as laid down by the Hon'ble Supreme Court in case of **Olga Tellis & Ors. Vs. Bombay Municipal Corporation and Ors.**

reported at AIR 1986 SC 180=1985(3) SCC 545 are not considered and it has been submitted that nobody can be deprived of their shelter without affording them the opportunity of being heard. The other individual circumstance of the concerned petitioners as prevailing in the year 1999 are mentioned in the petition showing that if they are removed or they are required to vacate, hardship will be caused to them. The petitioners have also relied upon the said decision of the Apex Court in case of **Olga Tellis & Ors. (supra).** It has been contended that the impugned action of issuance of notice calling upon the petitioners to vacate is illegal and arbitrary and deserves to be quashed and set aside.

5. It may be stated that pending the petition, the application being Civil Application No. 10148 of 2006 is preferred in Special Civil Application No. 6937 of 1999 by the said petitioners for joining Ahmedabad Urban Development Authority as party respondent on the ground that Ahmedabad Urban Development Authority has also issued notice for removal of construction and therefore, Ahmedabad Urban Development Authority should be joined as party to the proceedings. The perusal of the said notice issued by the AUDA shows that as alleged in the notice, the land is reserved for garden as per Town Planning Scheme No. 42 and Final Plot No. 261. This Court has issued notice

in the said application to AUDA. However, nobody has appeared for AUDA when the matter is taken up for hearing.

6. Ms. Shah, learned counsel appearing for the petitioners in Special Civil Application No. 19260 of 2006 and others has adopted the submissions on behalf of the petitioners of Special Civil Application No. 6937 of 1999.

7. Having considered the above, it appears that there is no dispute on the point that the petitioners are not having title over the land. It further appears from the report of the Gram Panchayat as well as of the AUDA that initially, the land was nearby the lake and now as the land is reserved for garden and the petitioners are encroachers over the land in question. It may be that at the relevant point of time, due to their financial condition or otherwise, they constructed their shelter and occupied for a period of about 20 years as sought to be canvassed on behalf of the petitioners, but when the authorities are taking steps for removal of such encroachment, the petitioners cannot assert as of right, that alternative land must be provided to them and till the alternative land is provided, they shall not vacate. Similarly, when it is an encroachment over the public property, if the Court gives indulgence and directs the authority to provide alternative land, such would

not be in the larger public interest and the reason being that the people will be tempted to make encroachment over the public property. This Court while exercising powers under Article 226 of the Constitution, would not create a situation, which results into permitting the encroachment over the public property. On the contrary, the Court would make an attempt to see that the public property are protected and are made available to the public at large for their benefit and are not appropriated or utilised by the encroachers who are having no authority to occupy such public property.

8. The reliance placed upon the decision of the Apex Court in case of Olga Tellis & Ors. Vs. Bombay Municipal Corporation and Ors. reported at AIR 1986 SC 180 and the equivalent reported at at 1985(3) SCC 545, is ill-founded, inasmuch as subsequently, the said decision is considered by the Apex Court in case of Ahmedabad Municipal Corporation Vs. Nawab Khan Gulab Khan & Ors. reported at 1997(3) GLR 1998, and the Apex Court observed inter alia at para 28 as under:

> "Encroachment of public property undoubtedly obstructs and upsets planned development, ecology and sanitation. Public property needs to be preserved and protected. It is but the duty of the State Government and the local bodies to ensure the same. This would answer the second question. As regards the fourth question,

it is to reiterate that judicial review is the basic structure of the Constitution. Every citizen has a fundamental right to redress the perceived legal injury through judicial process. The encroachers are no exceptions to that Constitutional right to judicial redressal. The Constitutional Court, therefore, has a Constitutional duty as sentinel qui vive to enforce the right of a citizen when he approaches the Court for perceived legal injury, provided he establishes that he has a right to remedy. When an encroacher approaches the Court, the Court is required to examine whether the encroacher has any right and to what extent he would be given protection and relief. In that behalf, it is the statutory duty of the State or the local bodies or any instrumentality to assist the Court by placing necessary factual position and legal setting for adjudication and for granting/refusing relief appropriate to the situation. Therefore, the mere fact that the encroachers have approached the Court would be no ground to dismiss their cases. The contention of the appellant-Corporation that the intervention of the Court would aid impetus to the encroachers to abuse the judicial process is tenable. As held earlier, if the appellant-Corporation or any local body or the State Government or the State acts with vigilance and prevents encroachment immediately, the need to follow the procedure enshrined as an inbuilt fair procedure would be obviated. But, if they allow the encroachers to remain in settled possession suficiently for long time, which would be a fact to be established in an appropriate case, necessarily suitable procedure would be required to be adopted to meet the fact situation and that, therefore, it would be for the respondent concerned and also for the petitioner to establish the respective claims and it is for the Court to consider as to what would be the appropriate

> procedure required to be adopted in the given facts and circumstances."

It was further observed by the Apex Court at para 29 as under:

> "It is true that in all cases it may not be necessary, as a condition for ejectment of the encoracher, that he should be provided with an alternative accommocation at the expense of the State which if given due credence, is likely to result in abuse of the judicial process. But no absolute principle of universal application would be laid in this behalf. Each case is required to be examined on the given set of facts and appropriate direction or remedy be evolved by the Court suitable to the facts of the case. Normally, the Court may not, as a rule , direct that the encroacher should be provided with an alternative accommodation before ejectment when they encroached public properties, but as stated earlier, each case requires examination and suitable direction appropriate to the facts require modulation."

Therefore, the decision upon which the reliance is placed by Mr. Oza, learned counsel for the petitioners is of no help to the petitioners. However, if the matter is considered in light of the aforesaid observations made by the Apex Court, then also, when under Town Planning Scheme, as the land is reserved for a public garden, it should be made available to the public at large. Such will be the situation even if the lake is there. The reason being that as observed by the Division Bench of this Court in the case

of **Shailesh R. Shah Vs. State of Gujarat reported 2002(3) GLR 2295**, the water bodies are required to be preserved and no construction nearby a particular area of the water bodies are to be permitted. Therefore, on both counts, if the action is taken for removal of the encroachment, such an action cannot be said as unreasonable or arbitrary on the part of the authority.

9. So far as providing for alternative land is concerned, as sought to be canvassed on behalf of the petitioners, such direction in my view is not required to be issued, which may result into encouraging the encroachment over the public property. It deserves to be recorded that the aforesaid observations made by the Apex Court in case of Ahmedabad Municipal Corporation(supra), were pertaining to the pavement, streets and footpaths and removal of the encroachment over such public roads. Even if such principles are made applicable, I find that in normal circumstances, as observed by the Apex Court, no direction should be given for providing of the alternative accommodation or alternative land to the persons who have made encroachment over the public property. It may be that on account of the general policy matters, the Government or the concerned authority may decide to undertake measures for rehabilitation of such hutments as may be permission in law.

10. The approach of the authority for removal of the encroachment over the public road may not be the same as it is required for the property other than the public road or street or pavement or both. In my view, if the matter pertains to the residential accommodation or shelter of hutments, some humanitarian approach may be required for providing some reasonable time to the persons concerned to shift their belongings and to vacate the land. Of course, such time may be provided, if the person concerned of his own undertakes to remove the encroachment and vacates the land by shifting his belongings to any other place. Otherwise in normal circumstances, for residential accommodation, six weeks time may be sufficient to the persons concerned to remove the encroachment and shift his belongings.

11. If the matter is examined in that light when the petition was entertained at the stage when the authority had issued the notice for removal of encroachment. Sufficient time has passed pending the petition. However, due to the prevailing monsoon, I find that on humanitarian consideration, if the concerned petitioner files undertaking within period of six weeks to this Court and produces the copy of the undertaking before the authority for vacating of his/their own by removal of the encroachment and shifting of his/their belongings from the land in question, they shall be granted time upto 15th

December, 2006. If the undertaking is not filed and the copy is not produced by the concerned petitioner/s as observed earlier, after the expiry of the period of six weeks from today, it would be open to the authorities to take steps for removal of the encroachment in accordance with law.

12. Subject to the aforesaid observations and directions, Rule discharged in Special Civil Application No.6937 of 1999. There shall be no order as to costs. Subject to the aforesaid directions, Special Civil Application Nos. 19260 of 2006 to 19267 of 2006 shall stand dismissed. Liberty to AUDA in case it is aggrieved by any of the observations and directions in the present order.

(JAYANT PATEL, J.)

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